No. 92-7549

In The

Supreme Court of the United States

October Term, 1993

THOMAS N. SCHIRO,

Petitioner,

vs.

ROBERT FARLEY, Superintendent
Indiana State Prison, et al.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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I. TRADITIONAL DOUBLE JEOPARDY PRINCIPLES BAR SCHIRO'S DEATH SENTENCE FOR A CRIME OF WHICH HE WAS ACQUITTED.

A. The Double Jeopardy principles governing prior acquittals and prior convictions are not identical; the doctrine of former acquittal bars the sentencing trial of a defendant on a charge in aggravation after he has been acquitted of the aggravator by the jury at his guilt trial.

Respondent contends that traditional principles of Double Jeopardy have no application to this case, and that petitioner's "claim, properly viewed, is one of collateral estoppel rather than of double jeopardy *simpliciter*." Respondent's Brief at 15. This radical shift of position[1] reflects Respondent's belated recognition of the impossibility of its position under *Green v. United States*, 355 U.S. 184 (1957), and *Price v. Georgia*, 398 U.S. 323 (1970), if Double Jeopardy principles *do* apply to Schiro's claim.[2] Respondent says that they do not because "Double Jeopardy, in the classic sense, prevents retrial regardless of whether the first trial ended in conviction or acquittal," Brief of Respondent at 11, "therefore, petitioner's double jeopardy argument would prevent *any* sentencing of a defendant after the 'guilt phase' of a trial has ended." Brief of Respondent at 11. This argument – that if

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[1] Respondent argued in its Brief in Opposition to certiorari that Schiro's collateral estoppel claim was waived because Schiro had purportedly failed to raise it in the Court of Appeals. This argument, too, was baseless. Schiro plainly contended in the Court of Appeals that his death sentence violated both principles of autrefois acquit and principles of collateral estoppel. See, *e.g.*, Brief of Petitioner [in the Court of Appeals] at 16: "This issue specifically contends that the doctrine of collateral estoppel was violated."

[2] Respondent notes that "[t]he grant of certiorari in *Caspari v. Bohlen*, No. 92-1500 . . . encompasses the question of whether *Bullington v. Missouri*, [351 U.S. 430 (1981),] should be overruled. Brief of Respondent at 25, n. 17. But that question is not presented in the present case, and Respondent is in no position to raise it. Nowhere in the lower courts or in its Brief in Opposition to certiorari did Respondent challenge *Bullington*; it cannot, therefore, do so now. See *Sullivan v. Louisiana*, 113 S.Ct. 2078, 2081 n. 1 (1993).

Double Jeopardy precludes a defendant's being sentenced for a crime of which he has been acquitted, it must equally preclude his being sentenced for a crime of which he has been convicted – is utter nonsense.

To be sure, the Double Jeopardy Clause of the Constitution encompasses the principles both of *autrefois* acquit and *autrefois* convict. But this does not imply, as Respondent does, that the doctrines of former *acquittal* and of former *conviction* are identical. The reason for the recognition that the Double Jeopardy Clause encompasses both is because they are different, not because they are the same. See *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) ("[*Justices of Boston Municipal Court v.] Lydon*[, 466 U.S. 294 (1984)] teaches that '[a]cquittals, unlike convictions terminate the initial jeopardy.' (citation omitted)").

"An acquittal is accorded special weight." *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980); see also *United States v. Scott*, 437 U.S. 82, 91 (1978) (the "law attaches particular significance to an acquittal."). Thus, the Double Jeopardy Clause bars a second trial following acquittal even if "the acquittal was based upon an egregiously erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). It does not, however, bar a second trial following an erroneous *conviction* and the reversal of that conviction. *United States v. Ball*, 163 U.S. 662 (1896). Had Ball been acquitted instead of convicted, he obviously could not constitutionally have been retried.

Respondent's argument seems to be that jeopardy does not end until sentencing proceedings have concluded. That is not – and of course cannot be – the rule in cases of acquittal. "[A] verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence." *Ball, supra*, at 671. The rule which Respondent propounds completely ignores the Court's repeated holdings that acquittals enjoy a special position in double jeopardy law. See generally *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) ("Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or

otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.' ").

As the Court noted in *Smalis v. Pennsylvania*, 476 U.S. 140, 145-146 (1986) "the Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged,' *Martin Linen*, [*supra* at 570]." Clearly, if Double Jeopardy bars an appeal because it would result in further fact findings, then it must likewise bar the situation here where the case proceeded directly to the "further [fact-finding] proceedings" with no intervening appeal.

A second proceeding is barred following a conviction only if all elements of the offense to be tried are the same as those involved in the original proceeding. Since the matters at sentencing in a noncapital context are different than those which the state must prove in the guilt proceeding, there is no Double Jeopardy bar to proceeding with sentencing following a conviction. Thus, Respondent's contention that Schiro's argument would result in the state's inability to proceed to sentencing after a conviction is specious.[3]

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[3] The cases cited by Respondent, *North Carolina v. Pearce* and *United States v. DiFrancesco*, are irrelevant to the issue before the Court because both cases dealt with sentencing hearings following conviction. In *DiFrancesco* the Court explained the differences between double jeopardy concerns related to sentencing and those regarding guilt-innocence determinations: "The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him. The defendant is subject to no risk of being harassed and then convicted, although innocent. Furthermore, a sentence is characteristically determined in large part on the bases of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature."

B. The implied acquittal doctrine applies to charges which are not greater and lesser offenses, and here the jury's failure to return a verdict of knowing murder is the constitutional equivalent of an acquittal.

Respondent argues that the *Green/Price* doctrine of implicit acquittals does not apply to Schiro's case for two reasons: (1) both *Price* and *Green* involved reprosecution for a greater offense after the defendant had been convicted of a lesser offense; and (2) in *Price* and *Green* each defendant was subjected to a complete reprosecution for the greater offense following appellate reversal of his conviction for the lesser included offense. Brief of Respondent at 19-20.

Respondent's contention that the holdings of *Green* and *Price* cannot be "extended" to the situation here because Schiro's case does not involve greater and lesser included offenses is answered by the *Green* opinion itself. In *Green* the Government contended, as Respondent does here, that the implicit acquittal doctrine should not apply because the offenses were not greater and lesser included offenses in that each contained elements not present in the other. The Court, noting that it "failed to comprehend how this assertion aids the Government," stated:

> In the first place, the District of Columbia Court of Appeals has expressly held that second degree murder is a lesser offense which can be proved under a charge of felony murder. [citations omitted]. Even more important, Green's plea of former jeopardy does not rest on his conviction for second degree murder but instead on the first jury's refusal to find him guilty of felony murder.
>
> *It is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense. If anything, the fact that it cannot be classified as "a lesser included offense" under the charge of felony murder buttresses our conclusion that Green was unconstitutionally twice placed in jeopardy.* American courts have held with uniformity that where a defendant is charged with

> two offenses, neither of which is a lesser offense included within the other, and has been found guilty on one but not on the second he cannot be tried again on the second even though he secures reversal of the conviction and even though the two offenses are related offenses charged in the same indictment. [citation omitted].

355 U.S. at 194, n. 14 (emphasis added).[4]

Respondent's effort to bring the present case within *Cichos v. Indiana*, 385 U.S. 76 (1976), by citing *Schad v. Arizona*, 111 S.Ct. 2491 (1991) (plurality opinion) for the proposition that "felony murder and knowing murder are . . . two ways of proving the same offense," Respondent's Brief at 20, is unavailing. The statute at issue in *Schad* permitted the jury to find the defendant guilty of first degree murder if the state proved either that the killing was premeditated or that it was committed during the commission or attempted commission of a robbery. Schad was indicted on a single count of first degree murder, and his jury was instructed that it could return a guilty verdict if all jurors unanimously agreed that either of the state's first degree murder theories had been proven beyond a reasonable doubt. In Schiro's case, unlike *Schad*, the state chose to file three separate counts of murder,[5] alleging both *mens rea* murder and felony murder [J.A. 3-5]. In Schiro's case, unlike *Schad*, separate verdict forms were given to the jury for each offense charged [J.A. 37-38]. By returning a guilty verdict on the felony murder – rape form and failing to return such a verdict on the *mens rea* murder form, the jury acquitted Schiro of the latter charge.

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[4] Likewise, in Indiana, "the cases generally make no distinction as to whether the numerous counts are lesser included offenses, greater offenses, or merely different charges concerning the same transaction. . . . [T]he axiom, silence means acquittal, [is] applied with no regard as to whether the count on which the verdict was silent was a greater or lesser included offense or a different charge for the same unlawful transaction." *Cichos v. State*, 208 N.E.2d 685, 687 (Ind. 1965).

[5] In Indiana, as elsewhere, the charging decision is the exclusive domain of the state. *Adams v. State*, 262 Ind. 220, 314 N.E.2d 53 (1974); *Van Hauger v. State*, 252 Ind. 619, 251 N.E.2d 116 (1969).

Finally, Respondent's suggestion that *Green* and *Price* are distinguishable from Schiro's case because *Green* and *Price* involved a complete reprosecution is untenable. Double Jeopardy following acquittal bars not only a second trial but also further factfinding proceedings " 'devoted to resolution of the factual issues going to the elements of the offense charged.' " *United States v. Martin Linen, supra* at 570. There can be no doubt that Schiro's penalty trial was a factfinding proceeding. One of the facts the jury had to determine was whether the state had proven beyond a reasonable doubt the existence of each element of at least one aggravating circumstance. Both alleged aggravating circumstances required the state to prove the elements of *mens rea* murder: an intentional killing. At a minimum Schiro's penalty trial was a further factfinding devoted to a resolution of the factual issue of intentional killing that had already been tried at the guilt trial.

Thus, *Green* and *Price* clearly dictate the result Schiro seeks. Respondent's attempts to distinguish those cases are baseless.

II. THE STATE COURT DID NOT MAKE ANY FACTUAL FINDINGS RELATED TO THE SILENT VERDICTS, AND THE FACTS OF SCHIRO'S CASE REVEAL THAT THE JURY INTENDED TO ACQUIT SCHIRO OF *MENS REA* MURDER AND FELONY MURDER – CRIMINAL DEVIATE CONDUCT.

A. Section 2254(d)'s presumption of correctness regarding factual findings is inapplicable because there were no factual findings on the issue at bar.

The § 2254(d) presumption of correctness applies only to state court findings of fact. Legal conclusions and mixed questions of fact and law require *de novo* federal adjudication. *Miller v. Fenton*, 474 U.S. 104 (1985); *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980). Section 2254(d) presupposes that a factual finding was made. Because no such finding was made in Schiro's case, § 2254(d) is inapplicable.

Respondent asserts that the Indiana Supreme Court made a factual determination that the silent verdicts on Counts I and

III did not constitute acquittals and that this finding should be presumed correct. Brief of Respondent at 38. However, the state court made *no* findings of fact with regard to the silent verdicts. Its view of the case rendered any such findings irrelevant.

The state court viewed the issue as whether the prosecution could proceed to the penalty trial and attempt to prove intent to kill after a conviction for felony murder which did not include an intent to kill.

> Schiro claims the aggravating circumstances of intentional killing could not be considered at the penalty phase because the ***felony murder as charged*** lacked the requisite elements of *mens rea* in committing the underlying rape. He attempts to apply a fundamental double jeopardy rule that a ***conviction*** of lesser included offense is an acquittal of the greater offense.

[J.A. 139 (emphasis added)]. The state court concluded that there is no Double Jeopardy violation when the state is permitted to prove additional elements in the penalty trial to support the aggravating circumstance alleged. The basis for this holding was two-fold: (1) under state law, the *crimes* of felony murder and intentional (*mens rea*) murder are not lesser and greater offenses, and (2) an aggravating circumstance is not an offense.

> An aggravating circumstance, however, is not an offense. A person convicted of either type of murder, that is, intentional killing under IC 35-42-1-1(1), or felony murder IC 35-42-1-1(2), can be shown to contain the aggravator of intentional killing justifying the imposition of the death penalty. One can be found guilty of felony murder where the intention was to commit the underlying felony without necessarily intending to commit the murder. It does not follow, however, that one convicted of felony murder cannot be shown to have intentionally killed the victim while perpetrating the felony.

[J.A. 139]

Thus, the state court saw the issue before it as requiring a comparison of the felony murder ***conviction*** and the aggravator alleged in order to determine whether, after a conviction for felony murder, the prosecution could prove at the penalty trial that the killing was intentional.[6] As a result of this misconception,[7] the state court was not required to make any finding with respect to the silent verdicts.[8]

Moreover, the Indiana Supreme Court's language makes it quite clear that the court's decision was based upon the *legal* effects to be attributed to the jury's verdict, not upon any question of *fact*. The court determined that a conviction for felony murder did not "*operate as*" an acquittal of the *mens rea* required for the aggravating circumstance [J.A. 140 (emphasis added)]. It reasoned that: "Thus the jury in the guilt phase never confronted the issue of intentional killing and its verdict *could not be considered* to have included any conclusion on that issue." [J.A. 140 (emphasis added)].

Respondent's § 2254(d) argument therefore falls with its premise. The Indiana Supreme Court simply made no factual

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[6] This explains why the majority state court opinion did not address the long-standing state rule that silent verdicts constitute acquittals regardless of whether greater and lesser offenses are involved. See Brief of Petitioner at 23, n. 19 and discussion of *Cichos v. State, supra* at n. 4.

[7] The state court misconceived the issue although Schiro presented it properly. Schiro's argument was:

> It is the position of the petitioner that because the jury failed to find him guilty [of Counts I and III], he was acquitted of those charges. The jury had the opportunity to convict the accused of the intentional murder of the victim, but it chose not to do so. The only intent required to be proven in a prosecution for felony murder is the intent to commit the underlying felony. (citation omitted) Because your petitioner was not convicted of an *intentional* killing, but rather Felony Murder, where the only intent proved is that of the underlying felony, *i.e.*, rape, the State was barred and the court was precluded from proceeding to the second stage of the proceedings.

Brief of Petitioner to the Indiana Supreme Court (2nd PCR) at 54.

[8] The court's recognition that the *crimes* of intentional (*mens rea*) murder and felony murder are not lesser and greater offenses is not a rejection of the fact that the aggravator alleged (intentional murder during the course of a felony) includes all elements of the crime of *mens rea* murder.

finding to which § 2254(d) could attach. No factual matters other than the jury's silence on Counts I and III – a fact not in dispute – were discussed or decided by the state court.

Respondent's suggestion that the lower federal courts relied upon some nonexistent state "fact finding" is equally unfounded. The courts below did not conclude that the state court had made any factual determinations relevant to Schiro's claims, but rather concluded that the state court's *legal* determination was controlling. There was no discussion of § 2254(d) in either federal court opinion, nor in the briefs of the parties. And the texts of the opinions clearly demonstrate that each federal court held itself bound by the state court's *legal* conclusion.

The court of appeals held:

> In order to assess the effect of the jury's findings, this Court looks to state *law*. (citation omitted). The Indiana Supreme Court squarely rejected Schiro's argument that he was acquitted of intentional murder. (citation omitted) . . . Since the jury's verdict did not amount to an acquittal under state *law*, the jury did not previously determine that Schiro did not intentionally murder Luebbehusen.

[J.A. 196] (emphasis added).

The district court held:

> It is a constitutional condition precedent to an application of the double jeopardy clause . . . that there be an acquittal. Whether there is an acquittal depends largely on state *law*. (citation omitted). There is simply no constitutional merit to the argument that somehow the failure of the jurors to render any decision on Counts I and III someway or other constitutes an acquittal which extrapolates into a double jeopardy argument that frees this defendant petitioner.

[J.A. 171] (emphasis added).

Moreover, Respondent has consistently argued that the state court holding rested upon principles of state *law*. Until

now, Respondent has never claimed that the state court made anything but a legal ruling.[9]

B. The jury intended to acquit Schiro of *mens rea* murder and felony murder – criminal deviate conduct.

The record is clear that Schiro's trial judge did *not* tell the jury to return only one verdict.[10] Thus, Respondent is relegated to arguing that Schiro's jury did not intend to acquit him of *mens rea* murder because: (1) in accordance with an alleged long-standing state practice of instructing juries to return only one verdict upon charges of both felony murder and *mens rea* murder, the prosecutor and defense counsel told the jury to return only one verdict; and (2) the issue of intent to kill was not before the jury because Schiro's counsel allegedly did not argue it. Brief of Respondent at 29-34.

1. The attorneys' "one verdict" remarks in summation do not bear the meaning attributed to them by Respondent.

Neither in the state courts nor in the federal courts below did Respondent once suggest that the lawyers' summations at Schiro's trial contained anything pertinent to a proper interpretation of the jury's silent verdicts. Now Respondent professes to find them crucially illuminating. It has set out the

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[9] Respondent argued to the court of appeals that the state court made a *legal* determination that the silent verdicts were not acquittals and that that finding was binding upon the federal courts: "The Supreme Court of Indiana concluded, as a matter of state *law*, that the failure to fill in the verdict forms as to either Count I or Count III was not equivalent to a finding of not guilty on either of those counts . . . And the question of whether or not there is an acquittal is purely a matter of state *law*." Brief of Respondent to the Court of Appeals at 20-21 (emphasis added).

[10] Respondent does not contend to the contrary. Respondent does say that the trial judge "instructed the jury, at petitioner's request, that 'the defendant is not on trial for any *offense* other than *that* charged in the information,' and referred again to the singular, to 'the crime charged.' " Brief of Respondent at 30 (Respondent's emphasis). But the notion that the jurors would have parsed this phraseology as "singular" rather than generic is too strained to require rebuttal.

guilt trial summations in twenty-nine printed pages in Appendix A to its brief in this Court. From these twenty-nine pages, Respondent culls five or six lines and stakes its case on its belated interpretation of them.

We shall show in a moment that Respondent has taken these five or six lines out of context and interpreted them in a way that Schiro's jurors would not have recognized. First, however, we must address Respondent's contention that "[t]he prosecution and defense arguments were entirely consistent with longstanding Indiana trial practice of instructing the jury to return only one verdict where multiple theories of the same offense are charged, as recognized by this Court in *Cichos v. Indiana*, 385 U.S. 76, 79-80 (1966)." Brief of Respondent at 30. Respondent relies upon this "longstanding . . . practice" both to paint the lawyers' summations in the colors that it wants them to wear and also to assimilate Schiro's case doctrinally with *Cichos*. It is therefore doubly disturbing that the supposed practice is a fiction.

a. Indiana juries are not told to return a single verdict when the state charges *mens rea* murder and felony murder for the death of a single person.

There is absolutely no support for the proposition that juries in Indiana are instructed to return a single verdict when the state charges several counts of murder of the same victim.[11] The fact that innumerable Indiana defendants have been convicted of both *mens rea* murder and felony murder for

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[11] Respondent cites two cases as support for its position that *mens rea* murder and felony murder may be tried together but that a defendant may not be convicted of both for the killing of a single person. Brief of Respondent at 30, citing *Sandlin v. State*, 461 N.E.2d 1116 (Ind. 1984) and *Bean v. State*, 267 Ind. 528, 371 N.E.2d 713 (1978). These cases hold only that under state law the trial judge may not enter a *judgment of conviction* and *sentence* for both *mens rea* murder and felony murder for the death of a single person. However, it is permissible for the jury to return *verdicts* on both charges. *Carter v. State*, 361 N.E.2d 145, 149 (Ind. 1977). If the defendant is convicted of both, it is the sentencing court's duty to merge the offenses and to enter judgment of conviction and sentence for only one of them. *Id.*

causing a single death belies Respondent's assertion that the state practice is what Respondent says it is.[12]

The practice involved in *Cichos* was another matter entirely.[13] Cichos was charged with involuntary manslaughter

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[12] If the practice in Indiana were as Respondent represents it to be, one would not expect to find reported cases where the defendant was convicted of both offenses. See *Yates v. Evatt*, 111 S. Ct. 1884, 1893 (1991) (it is a "sound presumption of appellate practice" that "jurors are reasonable and generally follow the instructions they are given"). But the following are a sampling of cases in which the defendant was found guilty by a jury of both *mens rea* murder and felony murder for the death of a single person: *Roche v. State*, 596 N.E.2d 896 (Ind. 1992); *Lewis v. State*, 595 N.E.2d 753 (Ind. App. 1992); *Jackson v. State*, 597 N.E.2d 950 (Ind. 1992) (sentence reversed on other grounds); *Kennedy v. State*, 578 N.E.2d 633 (Ind. 1991) (sentence reversed on other grounds); *Hopkins v. State*, 582 N.E.2d 345 (Ind. 1991); *Tapia v. State*, 569 N.E.2d 655 (Ind. 1991); *Evans v. State*, 563 N.E.2d 1251 (Ind. 1990), rev'd on other grounds, 598 N.E.2d 516; *McMurry v. State*, 558 N.E.2d 817 (Ind. 1990); *Pasco v. State*, 563 N.E.2d 587 (Ind. 1990); *Bustamonte v. State*, 557 N.E.2d 1313 (Ind. 1990); *Thomas v. State*, 562 N.E.2d 43 (Ind. App. 1990); *Lowery v. State*, 547 N.E.2d 1046 (Ind. 1989); *Hicks v. State*, 544 N.E.2d 500 (Ind. 1989); *Ingram v. State*, 547 N.E.2d 823 (Ind. 1989); *French v. State*, 540 N.E.2d 1205 (Ind. 1989); *Rondon v. State*, 534 N.E.2d 719 (Ind. 1989); *Huffman v. State*, 543 N.E.2d 360 (Ind. 1989); *Underwood v. State*, 535 N.E.2d 507 (Ind. 1989); *Martinez-Chavez v. State*, 534 N.E.2d 731 (Ind. 1989); *Watson v. State*, 520 N.E.2d 445 (Ind. 1988); *Mueller v. State*, 517 N.E.2d 788 (Ind. 1988); *Johnson v. State*, 516 N.E.2d 1053 (Ind. 1987); *Boyd v. State*, 494 N.E.2d 284 (Ind. 1986); *Shields v. State*, 493 N.E.2d 460 (Ind. 1986); *Burgans v. State*, 500 N.E.2d 183 (Ind. 1986); *Smith v. State*, 475 N.E.2d 1139 (Ind. 1985); *Newman v. State*, 485 N.E.2d 58 (Ind. 1985); *Robinson v. State*, 477 N.E.2d 288 (Ind. 1985); *Averhart v. State*, 470 N.E.2d 666 (Ind. 1984); *Sandlin v. State*, 461 N.E.2d 1116 (Ind. 1984); *Anderson v. State*, 471 N.E.2d 291 (Ind. 1984); *Ferry v. State*, 453 N.E.2d 207 (Ind. 1983); *Fletcher v. State*, 442 N.E.2d 990 (Ind. 1982); *Williams v. State*, 430 N.E.2d 759 (Ind. 1982); *Pointon v. State*, 408 N.E.2d 1255 (Ind. 1980); *Baldwin v. State*, 411 N.E.2d 605 (Ind. 1980); *Thompkins v. State*, 383 N.E.2d 347 (Ind. 1978).

[13] In *Cichos* the subject of a particular Indiana instructional practice became relevant because "[t]he judge's charge to the jury in . . . [Cichos'] first trial . . . [was] not a part of the record in . . . [the] case [before the Court]." 385 U.S. at 79 n. 4, and the Indiana Supreme Court below had explicitly relied upon " 'the trial court practice of telling the jury to return a verdict on only one of the charges [of involuntary manslaughter and reckless homicide] in view of the limitation on penalty' " pertaining to the latter offense. 385 U.S. at 79. (See note 14 *infra*.) In *Schiro*, where the judge's charge to the jury *is* in the record, this Court needs not resort to any "practice" to ascertain its contents. The preliminary instructions at Schiro's guilt trial appear at J.A. 10-19; the final instructions at the guilt trial appear

and reckless homicide. Those two offenses contained the same elements; the only distinction was the penalty; and at the time of Cichos' trial, juries were required to fix the sentence in their guilt verdict.[14] The practice that developed in this special situation, of instructing juries that they could convict of either involuntary manslaughter or reckless homicide but not both, had no application to separate counts charging *mens rea* murder and felony murder even in the *Cichos* era,[15] let alone since 1977.[16]

b. The court instructed the jury on the law; and the attorneys' summations neither could nor did supersede those instructions.

Disembarrassed from its reliance on a nonexistent "long-standing . . . practice," Respondent's argument that "the

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at J.A. 20-36; plainly, these instructions do *not* tell the jury to return a verdict on only one of the charges of *mens rea* murder and felony murder. Respondent's reliance on *Cichos* would thus be inappropriate even if the "practice" described in *Cichos* with regard to involuntary manslaughter and reckless homicide charges were also the Indiana practice with regard to *mens rea* murder and felony murder charges. But our point in the text is that the two practices are altogether different and that Respondent's attempts to conflate them is indefensible.

[14] Prior to October 1, 1977 the jury was required to "state, in the verdict, the amount of fine and the punishment to be inflicted . . . " Ind. Code § 35-8-2-1 [Burns 1975] (repealed effective October 1, 1977). Effective October 1, 1977 sentencing authority was removed from the jury in non-capital cases and vested in the trial judge. Ind. Code § 35-50-1-1 ("The court shall fix the penalty of and sentence a person convicted of an offense."). The need to instruct the jury to return a single verdict on multiple counts charging the same offense disappeared with the enactment of the new code.

[15] A sampling of single victim murder cases decided under the former Indiana Code, see n. 14, *supra*, reveals that there was no practice of informing juries to return a single verdict when the charges were *mens rea* murder and felony murder. *Birkla v. State*, 425 N.E.2d 118 (Ind. 1981); *Pointon v. State*, 408 N.E.2d 1255 (Ind. 1980); *McCall v. State*, 408 N.E.2d 1218 (Ind. 1980); *Abrams v. State*, 403 N.E.2d 345 (Ind. 1980); *Bonner v. State*, 392 N.E.2d 1169 (Ind. 1979); *McFarland v. State*, 381 N.E.2d 1061 (Ind. 1979); *Carter v. State*, 361 N.E.2d 145 (Ind. 1977).

[16] See notes 12 and 14 *supra*.

Jury's Silence on the 'knowing' Murder Count Did Not Amount to an 'Acquittal' or Other Determination on the Issue of Intent" (Brief of Respondent at 29) amounts to this: Because defense counsel once and the prosecutor twice used the phraseology "one verdict" in their jury summations, the jury was informed that it should return only one of the guilty-verdict forms submitted to it on Counts I, II and III, and should not adjudicate Schiro's guilt or innocence on each count. Respondent makes this argument although the trial court's instructions and the verdict forms themselves are singularly lacking in the slightest hint that the jury is to consider the three separately stated murder charges as mutually exclusive alternatives, and although the trial court charged the jury that "[t]he instructions of the court are the best source as to the law applicable to this case" [J.A. 20], while the attorneys' summations had the following limited functions:

> When the evidence is completed, the attorneys will argue the merits of the case. What the attorneys say is not evidence. ***Their arguments are given to assist you in evaluating the evidence and arriving at correct conclusions concerning the facts,*** but they are also intended to persuade you to a particular verdict; ***and those arguments may be accepted or rejected as you see fit.***

[J.A. 19 (emphasis added)].[17]

Even without this judicial caution, Respondent's reliance upon defense counsel's solitary reference to "one" verdict (Brief of Respondent at 30) could hardly be taken seriously.[18]

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[17] Even the prosecutor told the jury that it was not "[his] intention to tell [the jury] what to do." Brief of Respondent, Appendix A at App 1.

[18] The passage on which Respondent relies, as punctuated by the stenographer, reads as follows:

> "The thing I'd like to maybe do is suggest how you should go about your deliberations. Now, I'm no expert on this. I don't know any better than you all do, but, you'll have to go back there and try to figure out which one of eight or ten verdicts, I believe there are ten, that you will return back into this Court, and I believe the judge will explain every one of them to you, and instruct you on them. And, I think perhaps the best way, maybe you can go about this, is take these issues one at a time, because there's a logical sequence, I think, to them. I think first of all what you ought to do is sit down and decide the issue of insanity, because depending on that, you may just stop there or go on."

Brief of Respondent, Appendix A at App 17. However, the punctuation might as readily be:

> "The thing I'd like to maybe do is suggest how you should go about your deliberations. Now, I'm no expert on this. I don't know any better than you all do, but, you'll have to go back there and try to figure out which one of eight or ten verdicts – I believe there are ten that you will return back into this Court, and I believe the judge will explain every one of them to you, and instruct you on them – and I think perhaps the best way, maybe you can go about this, is take these issues one at a time, because there's a logical sequence I think to them. I think first of all what you ought to do is sit down and decide the issue of insanity, because depending on that, you may just stop there or go on."

And the former punctuation is less plausible, both because it makes the word "that" meaningless and because it disregards defense counsel's subject: the order in which the jury should take up the issues presented.

Respondent's reliance upon two statements by the prosecutor that the jury is "only . . . allowed to return one verdict" (*ibid.*) fares no better when the statements are viewed in their proper context. As this Court noted in *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974), it is all too easy to blow "[i]solated passages of a prosecutor's argument" out of proportion:

> Such arguments, like all closing arguments of counsel, are seldom carefully constructed *in toto* before the event; *improvisation frequently results in syntax left imperfect and meaning less than crystal clear.* While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends *an ambiguous remark* to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Id. at 646-647 (emphasis added).

Here, the prosecutor's pair of "one verdict" remarks followed an argument by defense counsel that the jury should

not return a verdict of guilty of felony murder – criminal deviate conduct because the criminal deviate conduct had occurred post mortem. Brief of Respondent, Appendix A at App. 25. The first remark quoted (in part) by Respondent was as follows:

> *Mr. Keating [defense counsel] makes an interesting argument that it isn't criminal deviant conduct to do it to somebody after you've killed them.* Uh, be that as it may, be that as it may, you are only going to be allowed to return one verdict. I didn't tell you about lesser included offenses, because, quite frankly, the State doesn't believe that this is a lesser included offense. I didn't tell you about the difficulties of making those fine line distinctions because I think this is what you call a gross . . . grossly obvious case.

Brief of Respondent, Appendix A at App. 27 (emphasis added).

The second remark, again quoted in part by Respondent, was as follows:

> *Let Mr. Keating [defense counsel] have his argument.* You're only allowed to return one verdict. You can't find him guilty of criminal deviant murder. You can . . . and rape, murder, and murder. *Let Mr. Keating have his argument.* We obviously have proven. . . . I'm sorry, I can't do that. You may find that we have obviously proven that there was a rape. You may find that we have obviously proven at this trial that there was a murder and the appropriate charge for you to return a finding of guilty on is murder in the conduct of a rape. There is ample evidence to support that verdict.

Brief of Respondent, Appendix A at App. 28 (emphasis added).

In context, it is perfectly apparent that the prosecutor was conveying to the jury that it could properly find Schiro guilty of Count II, felony murder – rape, even if it determined that Schiro was not guilty of Count III, felony murder – criminal

deviate conduct. Certainly the point would have been less ambiguous had the prosecutor stated: "You need not return a guilty verdict on each count; you are permitted to return a single guilty verdict" as opposed to "You are only allowed to return one verdict." But the prosecutor's meaning, in context, is the same.

And the jury would most likely have understood the prosecutor's "one verdict" comments in this way. In his initial summation, the prosecutor had urged the jury to reject the consent defense and to return a guilty verdict on both counts of felony murder.[19] It was not until rebuttal argument, after defense counsel invoked Schiro's post-mortem defense to the felony murder – criminal deviate conduct charge, that the prosecutor realized that consent was not the only defense in issue and, accordingly, told the jury that it could return a guilty verdict on one count only.[20]

In summary, Respondent's attempt to lift from a lengthy trial transcript a few ambiguous sentences, decontextualize them, and thereby argue that Schiro's "jury viewed its task as returning a single verdict," Brief of Respondent at 30, is as fanciful and futile a concoction as the fictive "longstanding Indiana trial practice," *ibid.* that Respondent has invented to conceal this maneuver.

2. The issue of Schiro's intent to kill was squarely before the jury.

Respondent claims that Schiro's intent to kill was not before the jury. Brief of Respondent at 32-35. Schiro entered two pleas to the charge counts: insanity and general denial

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[19] The prosecutor stated in initial summation:

> If there is no consent, then you may find defendant guilty of rape, murder. If there is no consent to deviant conduct, you may find the defendant to be guilty of Deviant Conduct Murder.

Brief of Respondent, Appendix A at App 8.

[20] It should also be noted that the prosecutor conjoined the first of his "one verdict" remarks with a reference to lesser included offenses. In that setting, the gist of the remarks would appear to be that the jury was not to return verdicts on the charged offenses and on the lesser included offenses.

[Tr.R 95]. The effect of these two pleas was to place the burden on the state to prove each and every element of the crime charged beyond a reasonable doubt and to require Schiro to prove his insanity by a preponderance of the evidence. Schiro's jury was so instructed. [J.A. 14, 16-17, 21-24]. It does not therefore, "strain[] credulity to suggest, as petitioner does, that the jury [rejected the insanity defense but] nonetheless gave sufficient weight to petitioner's evidence" to find that the state had failed to meet its burden of proving intent to kill beyond a reasonable doubt (Brief of Respondent at 33).

The submission of the lesser included offenses and the arguments on those offenses also placed the issue of Schiro's intent to kill squarely before the jury. The lesser included offenses proffered by the defense were voluntary manslaughter and involuntary manslaughter, Ind. Code § 35-42-1-3 and § 35-42-1-4, respectively. A principal distinction between the lesser included offenses and the *mens rea* murder charge was the requisite intent. Not only did the court believe that the evidence justified placing the lesser included offenses before the jury,[21] but both parties discussed them in summation. Brief of Respondent, Appendix A at App. 24, 27.

Faced with the issue of intent to kill and with separate verdict forms for *mens rea* murder and for two counts of felony murder, the jury found Schiro guilty of felony murder – rape and of nothing else. It thereby did exactly what it intended to do: it acquitted Schiro of *mens rea* murder. The state was barred from seeking Schiro's death by asking the trial judge to relitigate the issue of intent that the jury had

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[21] Under Indiana law, a criminal defendant must meet a heavy burden before he is entitled to instructions on lesser included offenses. *Tawney v. State*, 439 N.E.2d 582, 587 (Ind. 1982) (to justify the giving of a lesser included offense instruction "[i]t is not enough that the lesser offense be included within the offense charged, but there must also be evidence from which the jury could properly find that the lesser offense was committed while the greater was not."); *Hester v. State*, 262 Ind. 284, 315 N.E.2d 351 (1974) (defendant charged with felony murder who alleged insanity as a defense was not entitled to the lesser included offense instruction on the underlying felony as he was either guilty of felony murder or not guilty by reason of insanity).

resolved in Schiro's favor.[22] His death sentence must consequently be vacated.[23]

Respectfully submitted,

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[22] Respondent argues at pp. 31-32 of its brief that instruction number eight, defining *mens rea* murder, which is found at J.A. 22-23, is in fact an instruction applicable to all three murder counts and implies that the jury must have found intent to kill in order to return its guilty verdict on Count II, felony murder – rape. This is another instance of Respondent giving the Court half the relevant text. Instruction number eight advises the jury that intent to kill is a necessary element of "murder." However, there is no conceivable way the jury could, as Respondent suggests, interpret this instruction to apply to all three counts. Respondent ignores that portion of the instruction which provides: "[i]f you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, and that the defendant was not insane at the time of the murder, then you should find the defendant guilty." [J.A. 23]. Since the jury was instructed in both preliminary [J.A. 11] and final instructions [J.A. 21] that the underlying felony was a necessary element of each felony murder count, it is wildly implausible that the jury would have interpreted instruction number eight [J.A. 22-23] as applying to the felony murder counts.

[23] Since this result is required by *Green v. United States*, *Price v. Georgia*, *Ashe v. Swenson*, *Martin Linen Supply Co.*, and *Bullington* – all of which were decided before Schiro's conviction and death sentence became final on direct review – Respondent has no basis for invoking *Teague v. Lane*, 489 U.S. 288 (1989). In any event, Respondent concedes that it "did not raise the [*Teague*] new rule doctrine in the lower courts," Brief of Respondent at 44; if it had done so in the Court of Appeals, that court would have held the issue waived by Respondent's failure to present it in the district court, *Hanrahan v. Greer*, 896 F.2d 241 (7th Cir. 1990); see also *Thomas v. Indiana*, 910 F.2d 1413 (7th Cir. 1990); and respondent should hardly be permitted to better its position by sandbagging the Court of Appeals, see *Parke v. Raley*, 113 S.Ct. 517, 521 (1992); *Godinez v. Moran*, 113 S.Ct. 2680, 2685-2686 (1993). See also *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

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APPENDIX

Ind. Code § 35-8-2-1
(repealed effective October 1, 1977)

35-8-2-1 [9-1819]. Verdict – Assessment of fine or punishment. – When the defendant is found guilty the jury, except in the cases provided for, in the next three [two]* sections, must state, in the verdict, the amount of fine and the punishment to be inflicted; where the plea is guilty, or the trial is by the court, the court, subject to the same exception, shall assess the amount of fine and fix the punishment to be inflicted. [Acts 1927, ch. 200, § 1, p. 574.]

***Compiler's Notes**. . . . The bracketed word "two" was inserted by the compiler.

Ind. Code § 35-42-1-3

(a) A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter, a Class B felony.

(b) The existence of sudden heat is a mitigating factor that reduces what would otherwise be murder under section 1(1) of this chapter to voluntary manslaughter. *As added by Acts 1976, P.L. 148, SEC.2. Amended by Acts 1977, P.L.340, SEC.27.*

Ind. Code § 35-42-1-4

A person who kills another human being while committing or attempting to commit:

(1) a Class C or Class D felony that inherently poses a risk of serious bodily injury;

(2) a Class A misdemeanor that inherently poses a risk of serious bodily injury; or

(3) battery;

commits involuntary manslaughter, a Class C felony. However, if the killing results from the operation of a vehicle, the offense is a Class D felony. *As added by Acts 1976, P.L.148, SEC.2. Amended by Acts 1977, P.L.340, SEC.28.*